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No. 73-1173

In the Supreme Court of the United States

OCTOBER TERM, 1973

JOSEPH HORTON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, Joseph Horton, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the judgment of conviction entered by the United States District Court for the Western District of Texas.

OPINION BELOW

The opinion of the Court of Appeals is printed in the Appendix to the Petition (Appendix A).

JURISDICTION

The judgment of the Court of Appeals was entered on November 28, 1973. The conviction of the co-defendant, Willie Jordan, was reversed without remand. A petition for rehearing on behalf of petitioner was denied on January 3, 1974. The jurisdiction of this Court is invoked under 28, U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Did the Petitioner—who was arrested without a warrant by Agents with drawn guns and who was handcuffed and then searched—give a meaningful consent to search a car already under the Agent's control a few miles away from the location of his arrest?
2. Did probable cause exist initially for the arrest of the Petitioner which resulted in the search incident thereto that produced the keys for the subsequent "consent search".

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing . . . the persons . . . to be seized."

NATURE OF THE CASE

The Petitioner, along with the co-defendant, Willie Jordan, was convicted after a bench trial for possession of three pounds, two ounces of heroin in violation of Title 21,

Section 841(a). Upon appeal, Jordan's conviction was reversed for insufficiency of the evidence. The Petitioner received a sentence of ten years imprisonment with a special parole of ten years to follow.

Prior to trial a motion to suppress was filed. The trial judge heard the motion to suppress along with the merits of the case. After hearing argument, the trial court denied the motion to suppress, finding that ". . . the arrest and search and seizure was legal." (Tr. 120). Although the court said it would file complete findings and conclusions in writing, no such document was ever filed.

On appeal, not knowing upon what theory the trial court had relied for denying the motion to suppress, Petitioner's counsel urged the following grounds, either alone or together, for reversing the conviction based on violations of Petitioner's Fourth Amendment rights:

1. Probable cause did not exist for the initial arrest of the defendants in a taxi cab near the airport.
2. The search of the Chrysler in which the defendants had been riding prior to entering the taxi was not incident to their arrest.
3. The search of the Chrysler was not made with the meaningful or legal consent of the defendants.
4. Probable cause did not exist for the search of the Chrysler independent of the defendants' arrest.
5. Since the Chrysler was under the control of the agents they should have obtained a search warrant.
6. The search of the Chrysler was a direct result of the illegal arrest of the defendants.

In affirming Petitioner's conviction the court held that probable cause existed for the initial arrest of the defendants. Rejecting the theory that the search was incident to the arrest the court reasoned ". . . the only possible theory upon which this search may be upheld is on the basis of a voluntary consent search." (Op. at page .... of Appendix). The court then held that "In light of all the surrounding facts and circumstances, we are convinced that the consent was voluntary."

The "consent" in this case took place after the defendants were arrested by agents with drawn guns who curbed their cab. The defendants were handcuffed and thoroughly searched, keys to the Chrysler being seized from Petitioner. No contraband was found either in the cab or on the defendants. It is in that context that the following testimony of the agent was held to constitute consent by the Court of Appeals:

> "At this time I told Mr. Horton that *we were going to search the Chrysler* and wanted to know whether or not he had any objections to us taking him back to the vehicle and searching that vehicle. (Emphasis supplied). (Tr. 62).

At oral argument and on the Petition for Rehearing *en banc* (which was denied) counsel argued that the recent opinion of this court in *Schneckloth* v. *Bustamonte*, 36 L.Ed. 2d 854 (1973) controlled and on that basis, as well as the rationale of *Bumper* v. *North Carolina*, 391 U.S. 543 (1968), the "consent" was not a valid one.

STATEMENT OF FACTS

Testimony of Diogenes K. Galanos

He is a Customs Agent and was assigned to the Chicago office in September, 1972. On September 1, 1972 he received a telephone call from a person whom he did not know. This person stated as follows:

> ". . . a subject by the name of Willis Minnieweather, who was described to me as a negro male approximately thirty years of age, about six foot in heighth, (sic), weighing about a hundred and eighty to a hundred and ninety pounds had departed Chicago in route to El Paso, Texas where he was to make arrangments for a substantial quantity of smuggled heroin. He was reported to be driving a 1966 Oldsmobile, black vinyl top, brown bottom, with 1972 Illinois' license B-Boy-M-Mary 1390." (Tr. 6-7).

He first verified that such a license plate on such a car was registered in the name of Willis Minnieweather. He then spoke to Agent Fears in the El Paso Customs office, telling Fears essentially what he had been told over the telephone by the unknown caller; he also told Fears that the license plate and car checked out to a Willis Minnieweather (Tr. 8-9).

On September 11, the unidentified individual called again to advise Galanos, ". . . that the people he had told me about before were back down in the El Paso area." (Tr. 9). He relayed this information to Agent Fears in El Paso (Tr. 10).

Cross-examination of Agent Galanos

He never wrote down or discussed with anyone the phone call he allegedly received on September 11 (Tr. 12). The telephone call of September 11 came in the morn-

ing. He had never, to his knowledge, talked to that person before the call of September 1 (Tr. 13).

He had no other information regarding the caller and he had never on a prior occasion relied on that person for information of any kind (Tr. 14). Defendants' Exhibit A, the report he wrote on September 11, stated that ". . . the persons who were going down would attempt to make a purchase." (Tr. 15).

Testimony of Edwin Hernandez

He is a bookkeeper at the Travel Lodge-Central Motel in El Paso. Government Exhibit 1 is records from the motel showing that a Mr. Jordan stayed at the motel with a Mr. Minnieweather from September 1 to September 3 and numerous telephone calls were made to Chicago (Tr. 20).

The records which he was subpoenaed to bring to court were not assembled by him until after September 12 and he did not give out such information to anyone prior to the morning of this hearing (Tr. 21-23). The information furinshed to the court was not available in its present form on September 1, 1972 (Tr. 24).

The records show that one room was initially taken on the first day and two more rooms were subsequently taken (Tr. 24). He thinks the person who registered was the defendant Willy F. Jordan (Tr. 25).

The date of the registration is August 29. On that date two persons registered at the motel. He had never seen either of these two persons before (Tr. 26). His attempt to identify the defendant Jordan in the courtroom was his first attempt. He is not positive that Jordan is the person (Tr. 27).

Testimony of Ted Leneck

He is the Assistant Manager of the Downtowner Motor Inn of El Paso and was so employed in September, 1972. Government Exhibit 2 is a long-distince sheet for phone calls made from the motel on September 9, 10 and 11. It contains all but collect calls and shows the calls made from rooms 816, 818 and 915 (Tr. 28-29).

Although subpoenaed to bring all records of the motel for September 11 and 12 regarding rooms 816, 818 and 915, he was unable to locate the registration records (Tr. 30).

Government Exhibit 2 contains room numbers, telephone numbers and the places called (Tr. 31). It also reflects the name of the person who purported to make a call (Tr. 32).

Government Exhibit 2 contains entries showing calls made from rooms 816, 818 and 915 under the names of Minnieweather, Horton and Jordan for the dates September 9, 10 and 11 of 1972 (Tr. 92).

Cross-examination of Mr. Leneck

The first time he met Agent Fears was at 10 A.M. on the morning of September 11, 1972. Although he had records of the telephone calls filed in a folder at the time he spoke to Agent Fears he did not take them out of the folder on September 11, 1972. The day of the hearing is the first time that these records were taken out of the folder (Tr. 35).

The witness thinks he showed the records to Fears on the 11th. He also showed him the registration card and receipts (Tr. 36).

Testimony of A. L. Fears

He is a Special Agent for the Customs Service and resides in El Paso. He had been an agent for three years and before that was a Customs port investigator in Hous-

ton and also a police officer in that city for seven years (Tr. 39).

On September 1, 1972 he received a telephone call from Agent Galanos who stated:

> ". . . that a man by the name of Minnieweather and another Negro male had departed Chicago in route to El Paso, that they were already in El Paso and that they were here in El Paso to pick up a large quantity of heroin and transport it back to Chicago." (Tr. 40).

No other name than that of Minnieweather was mentioned. Galanos also gave him a description of a 1966 Oldsmobile and the license plate number. Galanos said that he had checked the registration of the license plate number and it came back registered to a different vehicle (Tr. 40-41).

On the afternoon of September 1, he located the suspect vehicle at the Travel Lodge Motel. He went inside and learned from the manager that a man by the name of Jordan was registered in rooms 408, 409 and 412, and that this man had been seen along with some other people using the 1966 Oldsmobile (Tr. 41).

He also learned that an individual named Minnieweather had made some telephone calls to Chicago. He also learned that a man named Jordan had registered on August 29 (Tr. 42).

After receiving this information an intermittent surveillance was mantained on the Oldsmobile.

On the afternoon of September 3, Fears saw the Oldsmobile leave the motel. He followed it on Interstate 10 to a service station where the car stopped for service. The vehicle then continued east on I-10 where he lost sight of it. When he lost sight of it there were four occupants in the car—a female, a child and two males. He could not identify any of the occupants (Tr. 43).

He never saw the car again. He was not able to identify the person who registered in the motel under the name of Jordan. He was never able to identify any person as an occupant of rooms 408, 409 and 410 from September 1 to September 3 (Tr. 44).

Government Exhibit 5 is a record of long-distance telephone calls made from rooms 408, 409 and 412 of the Travel Lodge-Central between August 29 and September 3, 1972. He received it on September 7. He gave the information on this exhibit to Agent Chavez in Chicago and requested subscriber information (Tr. 46).

On September 8, Agent Fears was told that the telephone numbers were in the west part of Chicago (Tr. 47). He received this information from Agent Chavez who said:

> ". . . this was in a predominately (sic) Negroe (sic) area and it was an area where they had problems with narcotic dealings and users." (Tr. 48).

On September 11 he was advised by Agent Galanos ". . . that the people he talked to me about on September 1 were back here in El Paso and that they were here to pick up a load of heroin and take it back to Chicago." (Tr. 48).

After receiving this information he started checking motels in El Paso and learned that a man by the name of Jordan and a man by the name of Horton had checked into the Downtowner Motor Lodge. Later that afternoon he established surveillance of the Downtowner. At approximately four P.M. two females entered the lobby and were pointed out to him as being the two females checked into the rooms registered to either Mr. Horton or Mr. Jordan (Tr. 49).

On the morning of September 11 he had obtained the list of telephone calls made from rooms 818, 816, and 915 of the Downtowner. He received this information by asking Mr. Leneck, the Assistant Manager, whether or not

there had been a telephone call from either room that was registered to Mr. Horton or Mr. Jordan (Tr. 50).

At 6 p.m. a male got off the elevator and was pointed out to him as being one of the men that was registered to either room 915, 818 or 816. That man was the defendant, Joseph Horton. The following occurred:

> "Mr. Horton proceeded out near the street where he took a yellow taxi. The taxi was followed from the Downtowner to the Rodeway Inn. The taxi parked near the entrance of the Knights Club. At this location Mr. Horton got out of the taxi and went inside the Knights Club and remained for a very short period of time. He returned to the taxi and the taxi was followed back to the Downtowner Motor Lodge." (Tr. 51.).

Mr. Horton got out of the cab and went inside the Downtowner. A short time later Mr. Horton and Mr. Jordan left the Downtowner and took a cab to the Rodeway Inn where they went into the Knights Club. The first time Jordan went into the Knights Club he remained there for five to ten minutes (Tr. 52-53).

Jordan and Horton left the Knights Club and went back to the Downtowner by cab. They went into the Downtowner. At approximately 8:10 P.M. Horton took a cab and went to the Holiday Inn at Airways. He got out of the cab and stood in front of the Flame Room. He was carrying a grey attache case (Tr. 53).

Thirty minutes later he went to the Midtown Holiday Inn by cab and stood near the entrance of the motel. Government Exhibit 4 is the grey attache case Horton was carrying at this time and is similar to the attache case that was claimed by him when the Chrysler was searched (Tr. 54-55).

After Horton was at the Midtown Holiday Inn for a short period of time he was met by Mr. Jordan who was driving a black 1971 Chrysler. Jordan got out of the Chrysler and stood near the vehicle for a while and later went over and joined Mr. Horton. Both of them walked to a service station where they made telephone calls from a pay phone (Tr. 55-56).

They then returned to the Chrysler and went to the Airways Holiday Inn again. Horton got out and stood near the entrance of the Flame Room. After a short period of time the Chrysler left the premises. It continued east on Interstate 10 where surveillance was discontinued. Five people were in the car when it left the Flame Room, none of whom can be identified by the witness (Tr. 56).

On the morning of September 12, Agent Fears started checking motels for the names of Minnieweather, Jordan and Horton. The results were negative. He established surveillance at the Rodeway Inn, the Midtown Holiday Inn and the Airways Holiday Inn. At approximately 3:00 P.M. he observed Mr. Horton arrive at the Knights Club in the 1971 black Chrysler and enter. Shortly thereafter he observed Mr. Jordan get out of the car and go into the front entrance of the motel. (Tr. 57-58).

Two females remained in the car. A short time later one of the females got out of the car and entered the Knights Club. She remained in there for a short period of time and then returned to the car. Shortly thereafter both Jordan and Horton got into the car and it was followed to a service station near the intersection of Hunter and Interstate 10 (Tr. 58).

Horton returned to the car from the front entrance of the motel. At the service station it appeared that the

Chrysler was being serviced. Shortly thereafter all four individuals got into a cab that came to the station. The cab was followed to the International Airport in El Paso (Tr. 59-60).

Agent Hailes and Agent Baydon remained at the service station. Agent Fears saw the car being serviced in the following manner: "The hood was raised on the vehicle and at one point it appeared to me that one of the attendants was putting gasoline into the vehicle." (Tr. 60).

When the cab containing the four occupants was near the passenger entrance of the airport it was stopped by the agents. The males were frisked and the taxi was searched. The females' purses were searched. Nothing was found as a result of the searches (Tr. 60-61).

After the taxi was stopped, Agent Fears identified himself to Horton; Horton was asked to identify himself, which he did (Tr. 61). The following then occurred:

> "I asked him where was he going and he said he was going to Chicago and that they all were flying back to Chicago by commercial airliner. At this time I asked who owned the Chrysler that was left at the service station?
>
> At this time Mr. Horton stated that the vehicle was his. We also found the keys on Mr. Horton's person that fit the Chrysler left at the service station. At this time I told Mr. Horton that we were going to search the Chrysler and wanted to know whether or not he had any objections to us taking him back to the vehicle and searching that vehicle. At that time Mr. Horton stated that he did not have any objection." (Tr. 62).
>
> * * *
>
> "After that we returned in a Government vehicle to the Chrysler which was left at the service station.

> At that location, after we were all out of the vehicles and standing around Agent Herrera asked again who owned the vehicle. Mr. Horton stated that the vehicle was his. Again he was asked whether or not he had any objection to us searching the vehicle and again he stated he had no objection. We began a search of the vehicle. The individuals were—as we were getting to pieces of luggage in the trunk of the vehicle we asked each individual to identify their luggage and once Agent Herrera located the grey attache case he asked who owned the attache case and Mr. Horton stated that the attache case was his. The attache case was locked and we asked Mr. Horton for keys to the attache case and he produced keys that opened the attache case." (Tr. 63).

After the case was opened the agents observed a brown paper sack containing a clear cellophane bag which contained a brownish powder substance that appeared to be heroin. Subsequently the bag was weighed and tested and it was determined that it contained three pounds, two ounces of heroin (Tr. 64).[1]

After the agents had transferred the defendants to a Customs Agency office in El Paso they were warned of their constitutional rights. The witness stated as follows:

> "At this time Mr. Horton stated that the heroin was purchased with his money, that the heoin (sic) was his and that the two females did not know anything at all about the heroin. I asked him whether or not Mr. Jordan knew about the heroin and at this time he said yes and no and again I asked him whether or not he

---

[1] The testimony of a chemist that the substance identified as Government Exhibit No. 3 contains heroin hydrochloride was stipulated to, as well as a chain of custody with respect to the evidence seized. (A. 1)

believed—whether or not Mr. Jordan knew about it and at this time he said he thought Mr. Jordan knew what was going on. He further stated that he was going to take the blame and he would rather not make any statement that would cause anybody else further trouble. (Tr. 67).

At approximately 10:00 P.M. that evening at the El Paso County Jail the witness had another conversation with the defendant Horton. The following transpired:

"At that time, again, I advised Mr. Horton of his Constitutional Rights and I asked him whether or not he objected to an interview at that time in regards to the case, and at this time he stated no, that he was willing to talk. This time I asked him whether or not he had employed legal counsel. He stated to me he had not employed legal counsel and he also stated that he didn't know whether or not he would have money enough to obtain legal counsel and wanted to know whether or not there was any chance of the Court appointing him legal counsel. At this time I advised him this would be a matter he would have to take up with the Court and if the Court saw fit they would or they could afford counsel for him. Then again I asked him if he would tell me exactly what happened. Again he said that the heroin was his, that he had purchased it with his own money, that he was taking it back to Chicago. He also stated that he was going to the International Airport to meet a man by the name of Minnieweather. He stated that Mr. Minnieweather would probably arrive around 5:00 P.M. and that he was to obtain money from Mr. Minnieweather to purchase tickets for the two females to fly back to Chicago and he stated that he probably would drive the Chrysler and I asked him if anything was going back with him and he said he wasn't for sure, but he thought Minnieweather was going back to Chicago in the Chrysler with him." (Tr. 68-69).

With respect to the defendant Jordan, the witness had a conversation with him shortly before 5:30 P.M. at a Customs Agency Service office (Tr. 69). The following transpired:

> "Agent Hailes came in and advised me that Mr. Jordan wanted to talk to the agent in charge of the case. I went into the office where Mr. Jordan was setting and again I advised him of his rights. I stated to him that if he made any statements they would be used in Court against him. He did not have to make any statement at this time, and he stated that he understood this warning. However, he wanted to make a statement in regards to the case. At this time I asked him to start at the beginning and tell me everything that he knew about the case, everything he wanted me to know about the case. Mr. Jordan began by stating that he and the two females had drove from Chicago in the Chrysler and that Mr. Horton and another man by the name of Minnieweather had flew down and that they all met at the Downtown Motor Lodge. He also stated that while at the Downtowner one night a Mexican male came to the room looking for Mr. Horton and Mr. Horton and the Mexican male left the presence of Mr. Jordan and stayed out of his presence for a short period of time and I asked what was said, if anything was said, and Mr. Jordan stated that he didn't know. However he stated that on September 11th Mr. Horton asked him to meet him at a motel on I-10 and I asked him why was he going to meet them at the motel and he stated he didn't know what Mr. Horton was going to do, but he believed he was going to meet someone at that motel. At this time he stated that he had been cooperating with another agency in Chicago and he had furnished them with information and once he returned to Chicago he would get ahold of that agency and he would also attempt to get telephone numbers and addresses of the contact here in El Paso and he said that he would

attempt to set up another buy. He also stated that he knew Minnieweather and that Minnieweather had been to El Paso on at least two prior occasions and at that time he was here to make contact to purchase narcotics." (Tr. 69-71).

Cross-examination of Agent Fears

It was only a week before this hearing that the witness learned that the information that Agent Galanos had given him was from an anonymous informant (Tr. 73).

After losing surveillance of the 1966 Oldsmobile on September 3, 1972, he never saw that vehicle again (Tr. 76). He never received any information regarding any illegal narcotic contraband or narcotic pick up involving the 1971 Chrysler (Tr. 76).

Agent Fears saw the defendant Jordan do nothing further than get into and get out of the various cabs he has already described and go to the various places he has already described. To his knowledge none of the other surveilling agents saw the defendant Jordan do anything else than what Agent Fears has already testified Jordan did (Tr. 79).

When the cab was stopped, the agents pulled their weapons and ordered the people to get out of the cab. The males were leaned up against the cab and searched (Tr. 80). All four occupants of the cab were handcuffed at the place where the cab was stopped. All personal items including keys, wallets and other documents were removed from the four at the place where the cab was stopped (Tr. 81).

Defendant's Exhibit B is registration for the 1971 Chrysler. It shows that the 1971 Chrysler is the property of the defendant Jordan (Tr. 83).

Defendant's Exhibit C is the report prepared by Agent Fears regarding the events to which he testified (Tr. 83). It was typed up about three days after the arrest (Tr. 84). The alleged statements by the defendants made after their arrest were not reduced to report form from the agent's notes until ten days before this hearing. (Tr. 85).

Agent Fears is the same Agent Fears who testified at the preliminary hearing in this matter (Tr. 85). At the preliminary hearing held on September 20, 1972 Agent Fears was asked these questions and gave these answers to Mr. Starke:

> "Q. And Jordan never gave you permission to search the vehicle, did he?
>
> A. No, I did not ask him. Defendant Horton stated that the vehicle was his.
>
> Q. That was not my question. I am specifically asking you that any time you were searching and interrogating the four persons at the airport, at the time of getting them out of the cab, did Mr. Jordan who was the owner of the 1971 Chrysler give you permission to search it?
>
> A. No, he did not." (Tr. 87-88).

Agent Fears did not observe either Mr. Horton or Mr. Jordan making telephone calls from the service station near the Midtown Holiday Inn as he testified that he did on direct examination (Tr. 88-89).

The following is an accurate recitation of the questions and answers given by Agent Fears at the preliminary hearing:

> "Q. Do you have any specific information that the 1971 Chrysler contained any contraband or narcotics at the time you placed the Defendants under arrest at the airport?
>
> A. No, sir, I did not.
>
> Q. When you searched the cab were you searching for any specific contraband, was that a general search?

A. It was in pursuant of the information that I had received.

Q. That information was on September 1, 1972?

A. The original information.

Q. No one had told you anything about a cab, had they?

A. No, they had not." (Tr. 89-90).

At the preliminary hearing the Magistrate specifically asked the witness the following:

> "Let's let him search his memory and see if there is anything you can think of. I know in these hearings you do not get a chance to prepare as thoroughly as you do in the trial hearings. Can you think of anything of substance that occurred in any of these transactions from the first time that you sighted these Defendants until the time they were arrested and searched at the car there that you have not testified about? I do not mean nit-picking things. I am talking about matters of substance, any incidence (sic) when you saw them that you might have overlooked. Stop and take time to search your memory."
>
> "A. Basically I think I have cited the acts." (Tr. 90).

Exhibit D is the transcript of the hearing before the magistrate (Tr. 94-95).

Testimony of Harry Menn

He is a Special Agent of the Bureau of Customs. On September 12, 1972 he was participating in a surveillance and was assigned to the Knights Club at the Rodeway Inn. He was inside the club at approximately 3:30 P.M. when he observed the defendant Horton enter the club and walk over to a booth on the wall and sit with a Mexican male who had been sitting there for about an hour (Tr. 96-97).

They talked for about four or five minutes and the Mexican left the club by the back entrance. A few minutes later Horton left the club, also by the back entrance (Tr. 97).

The witness cannot identify the person whom Horton met inside the club and he has never seen that man again (Tr. 97-98).

Testimony of Herbert Hailes

He is a Special Agent of the Bureau of Customs. On September 12, 1972 he participated in the surveillance of a 1971 Chrysler. Shortly prior to the arrest of the defendants he had the vehicle under observation at the Enco Station at Hunter and Gateway East in El Paso (Tr. 99).

After the defendants and the two ladies left the Chrysler and got into a cab he parked next to the car. From that time until the defendants returned to the car with the other agents no one entered the vehicle (Tr. 99).

Cross-examination of Agent Hailes

Agent Hailes parked his car behind the Chrysler in such a way that anyone attempting to move the car would have had to move his car also. During this period no one went to obtain a search warrant (Tr. 100).

Testimony of Robert Chessey

He is a Special Agent of the Bureau of Customs. On the evening of September 11, 1972 he was participating in the surveillance of a 1971 Chrysler. At the Midtown Holiday Inn he saw Mr. Horton arrive in a taxi and walk up and down in front of the motel. A few minutes later Mr. Jordan arrived in the Chrysler. Jordan got out of the car and talked with Horton. The two men then walked a short way to a gas station where they used the telephone (Tr. 102-103).

REASONS FOR GRANTING CERTIORARI

I.

THE CONSENT UPON WHICH THE AGENTS RELIED WAS IN FACT COERCED AND VIOLATIVE OF PREVIOUS CRITERIA ENUNCIATED BY THIS COURT.

The "consent" in this case came about after the agents with drawn guns curbed the cab in which the defendants were riding (Tr. 61, 80). The occupants of the cab, as well as the cab, were searched and no contraband was found (Tr. 80, 81).

Both defendants were handcuffed and all of their personal items were removed from their possession (Tr. 81). It is in that context that the following consent to search the Chrysler which the defendants had left at a gas station when entering the taxi took place:

> "At this time I told Mr. Horton that *we were going to search the Chrysler* and wanted to know whether or not he had any objections to us taking him back to the vehicle and searching that vehicle. (Emphasis supplied). (Tr. 62).

The officers drove back to the gas station with the defendants, still in handcuffs. There they met agents who had kept the Chrysler under guard and the following "consent" took place:

> "After that we returned in a Government vehicle to the Chrysler which was left at the service station. At that location, after we were all out of the vehicles and standing around Agent Herrera asked again who owned the vehicle. Mr. Horton stated that the vehicle was his. Again he was asked whether or not he had

any objection to us searching the vehicle and again he stated he had no objection. We began a search of the vehicle. The individuals were—as we were getting to pieces of luggage in the trunk of the vehicle we asked each individual to identify their luggage and once Agent Herrera located the grey attache case he asked who owned the attache case and Mr. Horton stated that the attache case was his. The attache case was locked and we asked Mr. Horton for keys to the attache case and he produced keys that opened the attache case." (Tr. 63).

It is true, as the opinion in the instant case states, that ". . . voluntariness is to be determined from all the facts and circumstances surrounding the defendant's alleged consent." P. 11, slip sheet opinion. And that *is* the narrow holding of *Schneckloth* v. *Bustamonte*, cited *supra*.

But the facts of the instant case differ from those of *Schneckloth* v. *Bustamonte* in three important respects.

First, prior to the search in that case ". . . no one was threatened with arrest and, according to Officer Rand's uncontradicted testimony, it 'was all very congenial at this time.' " 36 L. Ed.2d at 858. There was nothing congenial about the circumstances of the instant case. This was not a spontaneous stop based on an on-view traffic violation. Defendants were curbed in a moving car by men in plain clothes who drew their guns and handcuffed them. All parties in the cab and the cab itself were searched prior to the "consent". No warnings were given. All personal items had been taken from the two defendants, including the keys to the Chrysler, and the officer prefaced his request for consent by stating ". . . we were going to search the Chrysler . . ." (Tr. 62)

Second, Justice Stewart characterized the situation in *Schneckloth* v. *Bustamonte* as one in which ". . . there is

no evidence of any inherently coercive tactics—either from the nature of the police questioning or the environment in which it took place." 36 L.Ed. 2d at 874.

Can it be said that there is nothing "inherently coercive" about the facts of the instant case? Or is it more likely that the "consent" in the instant case is no more than the "acquiescence to a claim of lawful authority" that was condemned by the Supreme Court in *Bumper* v. *North Carolina,* 391 U.S. 543, 548-549 (1968)?

Finally, two important aspects that must be examined when considering "all the facts and circumstances surrounding a voluntary consent" have been given short shrift in the instant case. In *Schneckloth* v. *Bustamonte,* Justice Stewart said the following at page 864:

> "In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents."

The declaratory statement "we are going to search the Chrysler" as a preface to an alleged request for consent is not subtly coercive. It is overtly coercive.

And there is no more vulnerable subjective state of a person being interrogated than to be handcuffed, and stripped of his personal documents. Perhaps the officers had put their guns away. But what recourse did the defendants have if the guns were drawn again?

The entire atmosphere was implicit with coercion; and no mind reader is necessary to plumb the subjective state of the defendants' mind when asked for "consent."

II.

PROBABLE CAUSE DID NOT EXIST FOR THE ARREST OF THE DEFENDANTS AND THE SEIZURE OF THE KEYS TO THE CHRYSLER.

In the brief originally filed an analysis was made of Fifth Circuit cases in which the factors that make up "probable cause" were discussed. (pp. 20-25). Nothing is to be gained by re-examining these cases.

The panel relied heavily on *Draper* v. *United States*, 358 U.S. 307 (1959). As the panel admits, the informer in *Draper* was of proven reliability; in the instant case the information given, in addition to being wrong in several important respects, was given by an anonymous phone caller.

It is interesting to note that the arrest in the instant case and the search incident thereto *did not* bear out the reasons for the arrest, i.e. the defendants did *not* possess heroin. At that point, with the Chrysler under strict surveillance by other agents, the preferable action would have been for the agents to seek a search warrant of the Chrysler, search warrants being the preferred mode of action. *Schneckloth* v. *Bustamonte*, 36 L.Ed. 2d at page 858.

Had the agents sought a warrant, their claim to "consent" for the search would not have been necessary at a later date. Which leads one to wonder whether the "consent" was an afterthought occurring at a much later time.

CONCLUSION

In dissenting from the decision in *Schneckloth* v. *Bustamonte*, at pages 895-896, Justice Marshall spoke of *Bumper* v. *North Carolina, supra*, in language that clearly applies to the instant case:

> "That case makes it clear that police officers may not courteously order the subject of a search simply to stand aside while the officers carry out a search they have settled on. Yet there would be no coercion or brutality in giving that order. No interests that the Court today recognizes would be damaged in such a search. Thus, all the police must do is conduct what will inevitably be a charade of asking for consent. If they display any firmness at all, a verbal expression of assent will undoubtedly be forthcoming. I cannot believe that the protections of the Constitution mean so little."

It is obvious that the officers had settled upon a search in the instant case. This court should not give its imprimatur to the consent charade that followed.

For the foregoing reasons, the Petitioner respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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